MICHAEL C. SOLLE

v.

UNITED MALAYAN BANKING CORP. BHD.

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS CJ (MALAYA)
HASHIM YEOP SANI FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 213 of 1983]
23 JANUARY 1984

BANKRUPTCY: *Undertaking to repay - Whether there was breach - Whether bank precluded from recommencing bankruptcy proceedings.*

STATUTORY INTERPRETATION: *Intention of parties - Language.*

The respondent bank obtained a consent judgment against the appellant and two others. It issued a bankruptcy notice against the appellant. The bankruptcy proceeding was withdrawn on the appellant delivering to the respondent bank a letter of undertaking by which the appellant arranged to settle his debt according to the terms set out in the letter. Later, however, the respondent bank caused another bankruptcy notice to issue in another proceeding and purporting to rely on the failure to comply with the undertaking.

Held:

[1] On the fact disclosed and on the language of the undertaking there was no breach of the undertaking as a whole, though there was a breach regarding the repayment scheme.

[2] The language of clause 2 of the undertaking was clear and straightforward. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, which intention was to be collected from the whole of the agreement.

[Appeal allowed with costs.]

For the appellant - Atma Singh Veriah; M/s. Atma Singh & Co.
For the respondent - Khaw Chay Tee; M/s. Allen & Gledhill

JUDGMENT

Hashim Yeop Sani FJ:

This was an appeal against the ruling of the learned Judge that based on an undertaking executed by the appellant (CBK7) the respondent bank was not precluded from recommencing bankruptcy proceeding against the appellant. At the conclusion of the hearing of the appeal we decided to confine our decision only to the point concerning what proper construction ought to be given to the provision of the said undertaking.

The facts are straightforward and may be summarised as follows. A consent judgment for RM100,244.53 was entered against one Michael C. Solle (the appellant) and two others. A bankruptcy notice was caused to issue by the respondent bank. Thereafter the appellant managed to prevail on the bank to withdraw the bankruptcy proceeding against him upon the appellant delivering to the bank a letter of undertaking as exhibited. The respondent bank later caused another bankruptcy notice to issue in another proceeding purporting to rely on the failure to comply with the undertaking. That proceeding resulted in the present appeal.

The appellant's contention was that the arrangement in the terms of the letter of undertaking was that he was to make a downpayment of RM20,000 followed by monthly instalments of RM10,000 per mensem until the whole debt was cleared and he was also to deposit with the bank his 40,000 shares in a company and to do everything necessary for the effectual transfer of those shares to the bank in the event of default with the repayment scheme. The trial Judge held that the deposit of shares was meant to be a form of security for the fulfilment of the undertaking to make the payments of RM20,000 and the monthly instalments of RM10,000 and that the respondent bank had an option in their absolute discretion to either register themselves as owners of the shares or resort to other means of recovering the debts. In other words the respondent bank is not precluded from recommencing bankruptcy proceeding.

It is useful to examine the letter of undertaking which reads as follows.

NOW IT IS HEREBY PROVIDED AS FOLLOWS:

1. In consideration of your agreeing at my request to withhold bankruptcy proceedings against me, Michael Solle (NRIC BK 00072) of No. 22, Road 12/14, Petaling Jaya, Selangor, I hereby undertake to do as follows:

   (a) To pay you the sum of RM20,000 (Ringgit Twenty Thousand only) by the 31st day of July 1981.

   (b) To pay promptly to you the sum of RM10,000 (Ringgit Ten Thousand only) per month, the first of such payment commencing on the 10th day of August 1981, and thereafter the succeeding month until the whole of the judgment debt plus interest has been fully satisfied.

   (c) To deposit with you 40,000 shares in Mideast Development Sdn. Bhd. and to do everything necessary for the effectual transfer of such shares to you in the event of my default in compliance under this Letter of Undertaking.

2. In the event of my failure to comply with this said Letter of Undertaking, you shall forthwith revert with bankruptcy proceeding against me.

We are of the opinion that on the facts disclosed and on the language of the undertaking there has been no breach of the undertaking as a whole. There was breach in respect of the repayment scheme but there is complete compliance of Clause 1(c) of the undertaking. The language of Clause 1(c) of the undertaking is clear and that it is operative in the event of default in the repayment scheme.

The first limb of Clause 1(c) requires the appellant to deposit the 40,000 shares and the second limb of Clause 1(c) requires the appellant "to do everything necessary for the effectual transfer of such shares" in the event of default of the undertaking. Thus where there is a failure to comply with the repayment scheme the remedy provided by the undertaking is to effect the transfer of the shares to the respondent bank which was complied by the appellant.

The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intention of the parties are to be gathered from the language used. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement.

The language of Clause 2 of the undertaking is clear and straightforward, i.e. only in the event of failure to comply with the undertaking should the bank revert to bankruptcy proceeding. There was no failure to comply with Clause 1(c). There is also no provision in the undertaking which states that the respondent bank is at liberty to revert to bankruptcy proceeding despite the undertaking.

Appeal allowed. Costs to appellant. Deposit to be refunded.

Also found at [1984] 1 CLJ 151